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SUPREME COURT, U. S.

No. [illegible]

In the Supreme Court of the United States

OCTOBER TERM 1970

[illegible] JOHN CRIBBS, PETITIONER

v.

CURTIS W. TARR, JR., [illegible]

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE [illegible] CIRCUIT

MEMORANDUM FOR THE RESPONDENTS IN OPPOSITION

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[illegible]

In the Supreme Court of the United States

OCTOBER TERM, 1970

No. 244

JOHN CZECH, PETITIONER

v.

CURTIS W. TARR, ET AL., RESPONDENTS

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

MEMORANDUM FOR THE RESPONDENTS IN OPPOSITION

Petitioner brought a pre-induction suit in the United States District Court for the Northern District of Illinois, seeking to prohibit induction into the armed forces and, alternatively, to require the reconstitution of his local draft board (Pet. App. 18). His suit was premised on the claim that a Selective Service regulation requiring that local board members "if not all immediately become residents of the area in which their local board has jurisdiction" (32 C.F.R. 1604.52(c)), two of the four members of his local board did not reside within the

designated area.[1] The district court denied a preliminary injunction and dismissed the complaint.

The court of appeals affirmed, holding that, unlike the statutory requirement as to county residence, the area residence provision of the regulation is not mandatory or jurisdictional (Pet. App. 2). Since the board is to be considered as "a *de facto* board," the court ruled, its acts are valid and immune from collateral attack (Pet. App. 4). The court then concluded that petitioner could attack the composition of his local board only in a direct action "by proceedings in the nature of *quo warranto*" (Pet. App. 3).[2]

Petitioner registered with Selective Service on December 29, 1964 (Pet. App. 13). On April 28, 1969, he was ordered to report on May 15, 1969, for induction (Pet. App. 13). On May 2, 1969, he wrote to his board requesting SSS Form 150 to assert a claim to conscientious objector status (Pet. App. 13). The board furnished the form and postponed his induction (Pet. App. 13). Petitioner submitted the form, together with evidence relevant to his claim, and had a personal appearance before the board, at which he stated the basis

[1] Petitioner does not contend that any board members lived outside the *county* in which the board has jurisdiction, as required by statute (50 U.S.C. App. 460(b)(3)) (Pet. 7-12; Pet. App. 10-13).

[2] The court below said that "the Government concedes" that "persons having standing may attack the composition of Local Boards by proceedings in the nature of *quo warranto*." This is an inadvertance. The Government does not concede that *quo warranto* may be maintained except at the suit of a public officer.

of his claim (Pet. App. 14–16). After considering petitioner's claim, the board declined to change his classification (Pet. App. 16). A subsequent request for reconsideration, allegedly supported by new materials, was likewise considered and denied (Pet. App. 16). This suit followed.

I. Petitioner argues here that a pre-induction suit to enjoin his induction solely on the ground that his local board is unlawfully constituted under Selective Service regulation 32 CFR 1604.52(c) may be maintained under the decisions of this Court in *Oestereich v. Selective Service Board*, 393 U.S. 233, and *Breen v. Selective Service Board*, 396 U.S. 460 (Pet. 16–17). The contention rests on his reading of the questioned regulation as providing a jurisdictional requirement (Pet. 9–13).[1] As the court below correctly pointed out, however, the "only jurisdictional requirement as to place of residence" (Pet. App. 2) is in the statute: Board members must reside in the county or political subdivision in which the local board has jurisdiction (50 U.S.C. App. 460(b)(3)). The regulatory provision that they also reside in the same area is by its terms not absolute, but rather turns on a determination of practicability: 32 CFR 1604.52(c) provides that local board members shall be residents of the county in which the board is located and "shall also,

[1] Petitioner relied heavily on three district court cases in California: *United States v. Beltran*, 296 F. Supp. 385 (N.D. Cal.); *United States v. Machado*, 306 F. Supp. 995 (N.D. Cal.); *United States v. DeMarco*, 2 S.S.L.R. 3201 (N.D. Cal.). We agree with the court below (Pet. App. 2–3) that these cases were wrongly decided. Cf. *United States v. Nikolaisen*, 306 F. Supp. 66 (N.D. Cal.), decided after *Beltran* and *DeMarco*.

if at all practicable, be residents of the area in which their local board has jurisdiction."

Non-compliance with this regulation is not alone sufficient to nullify action taken by a board said to be directorily constituted by reason of area residence. For the acts of draft boards, like those of malapportioned legislatures (cf. *Baker v. Carr*, 369 U.S. 186), "are acts of a de facto political authority." *Clay v. United States*, 397 F. 2d 901, 911 (C.A. 5), vacated on other grounds *sub nom. Giordano v. United States*, 394 U.S. 310; *Sitler v. McNamara*, 398 F. 2d 893 (C.A. 3), certiorari denied, 395 U.S. 950. As such, they are valid despite irregularities in the composition of the board and are not subject to collateral attack. Cf. *Ex parte Ward*, 173 U.S. 452; *Jessen v. United States*, 242 F. 2d 243, 245 (C.A. 10); *United States v. Richmond*, 274 F. Supp. 33, 61 (C.D. Cal.). This principle, "founded upon considerations of policy and necessity" (*Norton v. Shelby County*, 118 U.S. 425, 441), applies with equal force whether the regulation is viewed as mandatory (cf. *United States v. Nusshaum*, 396 F. Supp. 66, 67 (N.D. Cal.)) or as directory (Pet. App. 2–3). As this Court observed in *Ex parte Ward*, *supra*, 173 U.S. at 456: "[T]he title of a person acting with color of authority, even if he be not a good officer in point of law, cannot be collaterally attacked." See the government's brief in opposition in *United States v. Brooks*, No. 1330 Misc., O.T. 1969, pp. 13–15, certiorari denied, 397 U.S. 969.[1]

[1] In *United States v. Cabbage*, No. 19775 (C.A. 6, decided July 31, 1970), a criminal prosecution for refusal to report for and submit to induction, the Sixth Circuit declined to set aside

Moreover, even if the acts of the *de facto* board were subject to collateral attack, petitioner's claim may not be raised in a pre-induction suit. Cf. *Anderson v. Hershey*, 410 F. 2d 492, 496 n. 11 (C.A. 6); *Palazolo and Adams v. Tennessee Local Board No. 85*, No. 20681 (C.A. 6, decided August 7, 1970). But see *United States v. Mechanic*, 305 F. Supp. 995, 1001 (N.D. Cal.). As noted in *United States v. Beltran*, 306 F. Supp. 585, 588 (N.D. Cal.), a case on which petitioner relies, it is the fact that one or more members of the local board might not meet the area residency requirement has no direct bearing on the validity of the particular classification assigned to a registrant. Indeed, petitioner made no challenge to his classification within the Selective Service System. Nor has he maintained in these proceedings that the board's refusal to reclassify him as a conscientious objector "was without statutory basis and in conflict with [his] rights explicitly established by statute," as distinguished from a determination "dependent upon an act of judgment by the Board." *Clark v. Gabriel*, 393 U.S. 256, 258.

In these circumstances, petitioner's suit is not within the judicial exception to Section 10(b)(3) as enunciated in *Boyer'ch*, *supra*, and *Breen*, *supra* (Pet. App. 4). Any other conclusion would

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an induction order on the ground that the local board was not properly constituted under 32 CFR 1631.52(c). Since the order was invalidated on another ground, however, the court urged (without so ordering) that the board be reconstituted in accordance with the area residency requirement, stating that applicant Cabbage would not be subject to reclassification until this was done.

not only lead to great disruption of the functioning of the Selective Service process, but it also would produce precisely the sort of "litigious interruptions" Congress explicitly sought to avoid by enactment of Section 1(b)(3).[5] *See Clark v. Gabriel, supra*, 393 U.S. at 258.

2. (a) Nor should petitioner be permitted to maintain an action in the nature of mandamus under 28 U.S.C. 1361, purportedly seeking to compel respondents to reconstitute his local board. While this section confers original mandamus jurisdiction on district courts, it does not enlarge the scope of mandamus relief under the common-law writ. Cf. *Prairie Band of Potawatomie Tribe of Indians v. Udall*, 355 F. 2d 304 (C.A. 10), certiorari denied, 385 U.S. 831. Thus, such an action is available only to enforce "a duty owed to the plaintiff," and this must be a duty which is "ministerial, plainly defined and peremptory." *Giuffanti v. Hershey*, 296 F. Supp. 553 (S.D. N.Y.). The requirement to appoint area residents as local board members "if at all practicable" does not meet this standard. Cf. *Clondara v. United States*, 425 F. 2d 605 (C.A. 8), petition for certiorari pending, No. 5426, this Term; *United States v. Nussbaum, supra*; *United States v. Pedtke, supra*; *United States v. Bruns, supra*; *Hessen v. United States, supra*. Moreover, the area residency requirement has

[5] This section provides: "The district courts shall have original jurisdiction of any action in the nature of mandamus to compel an officer or employee of the United States or any agency thereof to perform a duty owed to the plaintiff."

[6] But see the three district court cases in California *(supra*, p. 3, n. 3) which conclude that 32 CFR 1605.52(c) is mandat

no direct bearing on the validity of action taken by the board (*supra*, p. 5). As recognized in *Knoll Associates, Inc.* v. *Dixon*, 232 F. Supp. 283, 285 (S.D. N.Y.), "judicial interference [under 28 U.S.C. 1364] is not warranted * * * if the alleged irregularities are of such nature as would not prevent a valid order ultimately issuing from the administrative agency."

(b) Even if there were a mandatory duty, here owing to the plaintiff, the dismissal of petitioner's mandamus action was nevertheless appropriate. None of the respondents named in this action is in a position to correct whatever defect there may be. No one of them is charged, by statute or otherwise, with the duty of appointing local board members. Under the applicable statute (50 U.S.C. App. 460(b)(3)), local board members are "appointed by the President from recommendations made by the respective governors * * *." Neither the President nor the governor is a defendant in this case, and the persons who are defendants have no power to make appointments. Accordingly, there is no basis for mandamus against these respondents to take action which they had no legal duty—or, indeed, ability—to perform. Cf. *Hudgins* v. *Circuit Court of Chesapeake, Virginia*, 294 F.

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tory rather than directory. This view has thus far been properly rejected by every circuit court which has considered the question. But cf. *United States* v. *Cahlan*, *supra*.

[1] Petitioner named the following officials as defendants: Director of Selective Service; Illinois State Director of Selective Service System; Armed Forces Entrance and Examining Station Commander, Chicago, Illinois; Members of Local Board No. 44; and the Executive Secretary of Local Board No. 44.

Supp. 258 (E.D. Va.); *Hill v. U.S. Board of Parole*, 257 F. Supp. 129 (M.D. Pa.).

(c) Petitioner contends, however, that the decision below effectively denies "to a registrant all conceivable avenues to challenge the composition of [his] Local Board" (Pet. 18). Yet, it is obvious that petitioner's real concern here is not in reconstituting his local board but in preventing his induction; under the guise of a mandamus action, he seeks in effect to restrain the board from issuing to him an order to report for induction. Such pre-induction injunctive relief is outside the scope of permissible remedies under 28 U.S.C. 1361. (cf. *Harris v. Federal Housing Administration*, 256 F. Supp. 757 (D. Md.)). It also involves an impermissible attempt to circumvent the limitations of Section 10(b)(3) of the Military Selective Service Act (50 U.S.C. App. 460(b)(3)) as this Court has interpreted that Section in *Oestereich*, *supra*, and *Breen*, *supra*.

For the reasons stated it is therefore respectfully submitted that the petition for a writ of certiorari should be denied.

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